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No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

ESMAIL YERMIAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether, in a prosecution for the making of a false statement in violation of 18 U.S.C. 1001, the government must prove that the defendant knew that the statement was made "in [a] matter within the jurisdiction of [a] department or agency of the United States."

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statute involved	1
Statement	2
Reasons for granting the petition	7
Conclusion	14
Appendix A	1a
Appendix B	16a

TABLE OF AUTHORITIES

Cases:

Ebeling v. *United States*, 248 F.2d 429, cert. denied, 355 U.S. 907 ..... 5, 8, 10

United States v. *Baker*, 626 F.2d 512 . 5, 8, 9, 10

United States v. *Bankston*, 603 F.2d 528 .. 13

United States v. *Bramblett*, 348 U.S. 503 . 12

United States v. *Candella*, 487 F.2d 1223, cert. denied, 415 U.S. 977 ..... 5, 8, 9-10

United States v. *Cella*, 568 F.2d 1266 ..... 5, 8

United States v. *Feola*, 420 U.S. 671 ..... 9, 12

United States v. *Gilliland*, 312 U.S. 86 ... 11

United States v. *Hobson*, 519 F.2d 765, cert. denied, 423 U.S. 931 13

United States v. *Hooper*, 596 F.2d 219 9

United States v. *Howey*, 427 F.2d 1017 ... 13

United States v. *Lange*, 528 F.2d 1280 8

United States v. *Lewis*, 587 F.2d 854 ... 5, 8, 9

United States v. *Matanky*, 482 F.2d 1319, cert. denied, 414 U.S. 1039 10

Cases—continued: Page

United States v. *Stanford*, 589 F.2d 285, cert. denied, 440 U.S. 983 ..... 5, 8, 9, 10
United States v. *Waters*, 457 F.2d 805 10
United States v. *Wolf*, 645 F.2d 23 10

Statutes and regulation:

18 U.S.C. 3 13
18 U.S.C. 111 12
18 U.S.C. 641 13
18 U.S.C. 1001 .....*passim*
Cal. Penal Code § 484 (West 1970) 13
18 U.S.C. 1201 13
Cal. Penal Code § 532 (West 1970) 13
32 C.F.R. XXIII 10

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-15a) is reported at 708 F.2d 365.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1983. A timely petition for rehearing was denied on July 5, 1983 (App. B, *infra*, 16a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States

knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, respondent was convicted on three counts of making a false statement in a matter within the jurisdiction of a federal agency, in violation of 18 U.S.C. 1001. He was sentenced to concurrent terms of five years' imprisonment on each count, the first six months to be served, and the balance suspended in favor of a term of five years' probation. The court of appeals reversed (App. A, *infra*, 1a-15a).

1. The evidence at trial showed (see App. A, *infra*, 2a) that in 1979 respondent was hired as an engineer by Gulton Industries, a defense contractor. Respondent was required to obtain a Department of Defense security clearance, since he was to have access to classified material in the course of his employment. Gulton's security officer therefore asked respondent to fill out a "Department of Defense Work Sheet for Preparation of Personnel Security Questionnaire" (*ibid.*; Tr. 46-48).

In response to a question on the work sheet asking whether he had ever been charged with any violation of law, respondent failed to disclose that in 1978 he had been convicted of mail fraud, in violation of 18 U.S.C. 1341. In describing his employment history, respondent falsely stated that he had been employed by Bell Helicopter, International, of Houston, Texas, and Square D Corporation of Los Angeles, California (Tr. 47-49, 54-55, 61-62; GX 1, 6). The Gulton security officer typed

the information provided by respondent onto another document captioned "Department of Defense Personnel Security Questionnaire." Respondent reviewed that document for errors and signed a certification stating that his "answers [were] true, complete, and correct to the best of [his] knowledge and belief, and [were] made in good faith" and that he knew "that any misrepresentation or false statement * * * may subject [him] to prosecution under Section 1001 of the United States Criminal Code * * *" (GX 3, at 5). The form respondent signed bore the following warning directly above the signature block (Tr. 50-52; GX 3, at 5):

> *NOTE:* PENALTY FOR MISREPRESENTATION—Failure to answer all questions, or any misrepresentation (by omission or concealment, or by misleading, false, or partial answers) may serve as a basis for denial of clearance for access to classified Department of Defense information. In addition, Title 18, United States Code 1001, makes it a criminal offense, punishable by a maximum of 5 years imprisonment, $10,000 fine, or both, knowingly and willfully to make a false statement or representation to any Department or Agency of the United States as to any matter within the jurisdiction of any Department or Agency of the United States.
>
> This includes any statement knowingly and willfully made by employer or employee herein which is knowingly incorrect, incomplete or misleading in any important particular * * *.

After witnessing respondent's signature, the Gulton security officer mailed the completed form to the Defense Industrial Security Clearance Office for processing (Tr. 51-52). Government investigators subsequently discovered that the information respondent had furnished was false, and he was denied a security clearance. When told of the discovery, respondent acknowl-

edged that the information he had provided was false (App. A, *infra*, 2a; Tr. 68).

At trial, respondent testified that he had responded falsely to questions on the security questionnaire concerning his criminal record and employment history (Tr. 58-60). He explained that he had made the false statements so that the information on the security questionnaire would be consistent with similar fabrications he had included on his employment application (Tr. 62). Respondent testified that he believed the information on the form would be used by Gulton only for classification of its employees and that he was unaware that the information was to be transmitted to the Department of Defense or to any other government agency (Tr. 62-63).[1] Respondent asserted that he had not read the form carefully when he signed it and thus did not notice either the words "Department of Defense" on the first page or the warning printed above the signature block (Tr. 65-66).

Prior to trial, respondent submitted a proposed jury instruction stating, *inter alia*, that a statement is fraudulent "if known to be untrue, and made or caused to be made with the intent to deceive the Government agency to whom submitted" (E.R. 7).[2] The trial court rejected that proposal and instead instructed the jury that the intent element of Section 1001 requires a finding that petitioner "did * * * [the] act or acts [charged] with knowledge * * * that the writing or document was false or fictitious" and that he "knew or should have known that the information was to be submitted to a government agency" (Tr. 109). Respondent objected to the instruction, contending that only actual

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[1] Respondent testified that he did not believe Gulton "would have either the resources or the inclination" to verify the data he had furnished (Tr. 69).

[2] "E.R." signifies the excerpt of record filed in the court of appeals.

knowledge that a statement is being made to an agency of the United States satisfies the intent element of Section 1001 (Tr. 84, 115).

On appeal, respondent again did not dispute that he had made false statements on the security questionnaire, but claimed only that he did not know the questionnaire would be sent to the government for purposes of a security clearance. Respondent contended that the trial court erred in failing to instruct the jury that it was required to find that he had actual knowledge that the statements were made in a matter within the jurisdiction of a federal agency (App. A, *infra*, 3a).

2. The court of appeals reversed (App. A, *infra*, 1a-15a). The court held that in a prosecution under Section 1001 the government must prove beyond a reasonable doubt that the defendant knew at the time he made the false statement that it was made in a matter within the jurisdiction of a federal agency. The court recognized (App. A, *infra*, 5a-6a) that its holding conflicts with decisions of the Fifth, Sixth and Seventh Circuits.[3] In addition, it acknowledged that its construction of the intent requirement of Section 1001 is not mandated by the language of the statute, which it

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[3] *United States* v. *Baker*, 626 F.2d 512, 516 (5th Cir. 1980); *United States* v. *Stanford*, 589 F.2d 285, 297 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); *United States* v. *Lewis*, 587 F.2d 854, 857 (6th Cir. 1978) (per curiam). The court observed (App. A, *infra*, 4a-5a) that in other cases courts have assumed, without deciding, that knowledge of federal involvement is an element of a violation of Section 1001, citing *United States* v. *Cella*, 568 F.2d 1266, 1288 (9th Cir. 1977); *United States* v. *Candella*, 487 F.2d 1223, 1226-1227 (2d Cir. 1973), cert. denied, 415 U.S. 977 (1974); and *Ebeling* v. *United States*, 248 F.2d 429, 434-435 (8th Cir.), cert. denied, 355 U.S. 907 (1957).

characterized as "ambiguous" (App. A, *infra*, 6a).[4] However, the court concluded that the legislative history of Section 1001 and its predecessors, although "not entirely conclusive" (App. A, *infra*, 7a), suggests that Congress intended that knowledge of the facts giving rise to federal jurisdiction be an element of the offense.

The court observed (App. A, *infra*, 8a) that an earlier version of Section 1001 expressly required proof of an intent to defraud the government. In 1934 Congress removed the reference to intent to defraud and added the requirement that a statement be made in a matter within the jurisdiction of a federal agency. The court cited various statements made during congressional consideration of the 1934 amendment, in which legislators suggested examples of false statements that would be covered by the amendment (App. A, *infra*, 10a-12a). Although the court acknowledged that many of the legislators' comments addressed versions of the legislation that ultimately were not enacted, it concluded that the comments nonetheless indicated that the legislators believed the 1934 amendment would cover cases in which the maker of a statement would have known that it was made in a matter within the jurisdiction of a federal agency (*id.* at 12a).[5] The court concluded on the basis of this legislative history "that Congress intended that knowledge of federal involvement

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[4] The court of appeals believed (App. A, *infra*, 6a-7a) that the placement and punctuation of the terms "knowingly and willfully" do not indicate whether those terms modify only the phrase "makes any false, fictitious, or fraudulent statements" or the broader phrase "in any matter within the jurisdiction of any department or agency of the United States * * * makes any false, fictitious, or fraudulent statements."

[5] In particular, the court pointed to Congress's concern with the presentation to the Department of the Interior of false papers concerning "hot oil" and with the use of false wage certificates submitted for payment to the Public Works Administration (App. A, *infra*, 12a).

be an element of the crime" and that "the defendant's knowledge of federal involvement is entirely relevant to the proper effectuation of the Congressional goals * * *" (*id.* at 12a-13a).

The court of appeals rejected the government's alternative argument that any requirement of knowledge of federal involvement was satisfied by the objective "should have known" portion of the jury instruction. In the court's view, the instruction that respondent "knew or should have known that the information was to be submitted to the government" was insufficient because it allowed the jury to return a conviction even if it believed that respondent did not actually know that his statements were within federal agency jurisdiction. The court concluded that under the subjective standard of criminal knowledge used by the Ninth Circuit the jury was required to find—beyond a reasonable doubt—that respondent had actual knowledge of federal involvement. App. A, *infra*, 14a-15a.

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question concerning the elements the government must prove to establish a violation of the federal false statement statute, 18 U.S.C. 1001. Section 1001 makes it a crime "in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully [to] * * * make[ ] any false, fictitious or fraudulent statements." The court of appeals has held that a defendant cannot be convicted under Section 1001 unless the government establishes beyond a reasonable doubt not only that the defendant's statement was made in a matter within the jurisdiction of a federal agency and that the defendant knew the statement was false, but also that the defendant knew of the facts giving rise to federal jurisdiction. That unprecedented holding, which is clearly at odds with the legislative purpose underlying Section 1001, conflicts with deci-

sions of the three other courts of appeals that have considered the issue. If permitted to stand, the decision will substantially impede the government's ability to prosecute persons who have made false statements that—although not made directly to a federal agency—have the capacity seriously to interfere with governmental functions.

1. The Fifth, Sixth and Seventh Circuits have held that knowledge that a statement is made in a matter within the jurisdiction of a federal agency is not an essential element of a violation of Section 1001. *United States* v. *Baker*, 626 F.2d 512 (5th Cir. 1980); *United States* v. *Lewis*, 587 F.2d 854 (6th Cir. 1978) (per curiam); *United States* v. *Stanford*, 589 F.2d 285 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979). In each of those cases the defendants had submitted false statements to a state or local agency responsible for administering a program involving federal funding[6] and later claimed not to have been aware of the federal involvement in the program. In each case the court of appeals rejected the defendants' contention that the jury should have been instructed that it was required to find beyond a reasonable doubt that the defendants knew of the federal involvement.[7]

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[6] In *Baker* the defendants submitted false time sheets to a local housing authority, which in turn submitted the information to the Department of Housing and Urban Development in connection with the documentation of expenditures of federal grant funds. In *Lewis* and *Stanford* the defendants applied through state agencies to receive benefits under the Aid to Families With Dependent Children and food stamp programs.

[7] In some Section 1001 cases, courts have noted that the evidence indicated that a defendant knew of federal involvement. However, these cases do not hold squarely that such knowledge is an essential element of the violation. See, *e.g.*, *United States* v. *Cella*, 568 F.2d 1266, 1288 (9th Cir. 1977); *United States* v. *Lange*, 528 F.2d 1280, 1287 n.11 (5th Cir. 1976); *United States* v. *Candella*, 487 F.2d 1223, 1226-1227 (2d Cir. 1973), cert. denied, 415 U.S. 977 (1974); *Ebeling* v. *United States*, 248 F.2d 429, 434-435 (8th Cir.), cert. denied, 355 U.S. 907 (1957).

The three courts of appeals declined to read into Section 1001 an "unexpressed requirement" that an individual be aware not only that his statement is false, but also that his fraud is being perpetrated on the federal government (*United States* v. *Lewis*, *supra*, 587 F.2d at 857, citing *United States* v. *Feola*, 420 U.S. 671 (1975)). The courts found clear support for their construction of Section 1001 in the underlying legislative purpose to prevent the perversion of the authorized functions of federal agencies. See *United States* v. *Baker*, *supra*, 626 F.2d at 515-516; *United States* v. *Stanford*, *supra*, 589 F.2d at 297. They concluded that requiring proof of actual knowledge of federal involvement "would give the term [jurisdiction] a narrow and technical meaning not intended by Congress." *Ibid.*

Unlike the Fifth, Sixth and Seventh Circuits, which "declin[ed] to write any such requirement into the Act" (*United States* v. *Lewis*, *supra*, 587 F.2d at 857), the court below concluded that knowledge of the facts giving rise to federal jurisdiction is an essential element of a violation of Section 1001 and that the prosecution therefore must establish such knowledge beyond a reasonable doubt. Unless this conflict in the circuits is resolved, there will be a serious adverse effect on the government's ability to protect federally-sponsored programs and other governmental functions from fraud.

The holding of the court below will affect a broad range of false statement prosecutions. Much information that is not transmitted directly to the federal government nevertheless is capable of affecting federal functions because it ultimately is transmitted to a federal agency or otherwise used in connection with a federal program.[8] For example, many federal benefit pro-

[8] It is well established that statements may be made in a matter within the jurisdiction of the United States for purposes of Section 1001, even if they are not made directly to the federal government. See, *e.g.*, *United States* v. *Hooper*, 596 F.2d 219, 222-223 (7th Cir. 1979); *United States* v. *Candella*, *supra*, 487

grams, including those relating to public welfare, medical care, employment training, and low income housing, are administered primarily through state, local, or private agencies. Beneficiaries of such programs normally do not submit applications or other information directly to the federal government; rather, they deal with intermediary agencies.[9] Subcontractors on government contracts normally submit to the prime contractor statements concerning prices, costs, and performance standards,[10] while sellers of a commodity subject to a government pricing program may provide certifications to purchasers.[11] As in this case, private defense contractors obtain information from their employees and forward it to the federal government, which conducts security investigations. In each of these situations, false statements have the capacity to interfere seriously with the integrity of a federal program: they can induce the payment of federal funds not authorized by statute, or the granting of a security clearance to an individual who should not have access to sensitive defense information. As the courts of appeals have noted,[12] these adverse effects on federal functions

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F.2d at 1227; *United States* v. *Matanky*, 482 F.2d 1319, 1322 (9th Cir.), cert. denied, 414 U.S. 1039 (1973); *United States* v. *Waters*, 457 F.2d 805 (3d Cir. 1972) (per curiam).

[9] See, *e.g.*, *United States* v. *Baker*, *supra* (public housing); *United States* v. *Stanford*, *supra* (welfare benefits); *United States* v. *Matanky*, *supra* (medical benefits).

[10] See, *e.g.*, *Ebeling* v. *United States*, *supra*; 32 C.F.R. XXIII (subcontracting policies and procedures).

[11] See *United States* v. *Wolf*, 645 F.2d 23 (10th Cir. 1981).

[12] See *United States* v. *Baker*, *supra*, 626 F.2d at 516; *United States* v. *Stanford*, *supra*, 589 F.2d at 297-298. As the court stated in *Baker*, *supra*, 626 F.2d at 516:

> 18 U.S.C. § 1001 is designed to protect federal funds and functions from fraudulent interference. In furthering these purposes, it is irrelevant whether defendant knew that his

can occur whether or not the person making the false statement can be shown to have been aware of the facts supporting federal jurisdiction.

The decision below will make it impossible to obtain convictions under Section 1001 in many cases. Awareness of federal involvement is often peculiarly within the knowledge of the defendant; when a false statement is not submitted directly to a federal agency, such awareness cannot be inferred simply from the making of the statement. Even in a case like this one, in which the form gives clear notice that statements will be submitted to a federal agency, the government may be unable to rebut the defendant's assertion that he did not see the notice. Here the form was captioned "Department of Defense Personnel Security Questionnaire," and a large warning over respondent's signature explained that false statements could result in prosecution under Section 1001. Nevertheless, the government was unable to present direct evidence to refute respondent's testimony that he failed to notice either the caption or the warning. The court below compounded the difficulties of proof by holding that the government would not be permitted to satisfy its burden of proof by showing that under the particular circumstances a reasonable person should have known that a statement fell within the jurisdiction of a federal agency; instead the government must establish subjective knowledge of federal involvement. In many cases, such proof will be impossible, even though the potential for harm to federal functions is clear.

2. The holding of the court below that knowledge of federal involvement is an essential element of a violation of Section 1001 is at odds with Congress's purpose: protecting federal functions and funds from fraud. As the Court explained in *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941), the statute, as amended in 1934, "in-

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intentionally false statements might eventually influence a federal agency.

dicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." In view of the broad legislative purpose, the Court has concluded that Section 1001 is to be read expansively. See *United States* v. *Bramblett*, 348 U.S. 503, 507 (1955) ("[t]here is no indication in either the committee reports or in the congressional debates that the scope of the statute was to be in any way restricted"). The decision below subverts the broad legislative objective by effectively immunizing a broad category of false statements that are not made directly to a federal agency but that can nevertheless cause serious harm to federal functions. Congress could not have intended such a result.

The conclusion of the court below that the reference to federal involvement in Section 1001 is not simply a jurisdictional requirement, but also part of the scienter requirement of the statute, is inconsistent with the reasoning of this Court in *United States* v. *Feola*, *supra*. In *Feola* the Court held that knowledge of facts giving rise to federal jurisdiction is not an essential element of a violation of the federal assault statute, 18 U.S.C. 111. The Court looked to the purposes of the statute in concluding that "[a]ll the statute requires is an intent to assault, not an intent to assault a federal officer." 420 U.S. at 684. The legislative purpose underlying Section 1001 similarly indicates that the statute requires only the intent to deceive, not the intent to deceive the federal government. As in *Feola*, construction of the statute not to require knowledge of jurisdictional facts does not create any risk of unfairness to defendants, because the conduct at issue is wrongful regardless of the identity of the target. See 420 U.S. at 685.[13]

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[13] The court of appeals suggested in a footnote (App. A, *infra*, 14a n.14) that *Feola* could be distinguished from this case on the ground that committing an assault is a crime in every state, even apart from the federal statute. However, the same

Nothing in either the language or the legislative history of Section 1001 indicates that Congress meant to require that the government establish beyond a reasonable doubt that a defendant had knowledge of the facts that give rise to federal jurisdiction.[14] The court of appeals' unprecedented expansion of the government's burden of proof in Section 1001 cases will seriously interfere with the government's ability to protect its funds and functions from fraud. In view of the conflict among the circuits created by the decision below, review by this Court is warranted.

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can be said of the making of a false statement. See, *e.g.*, Cal. Penal Code § 532 (West 1970) (false pretenses); *id.* § 484 (theft). In any event, making of a false statement punishable under Section 1001 is malum in se; thus, there is no danger that an unsuspecting defendant will be unfairly surprised if his conduct turns out to be a violation of a federal statute.

See also *United States* v. *Bankston*, 603 F.2d 528, 532 (5th Cir. 1979) (knowledge of interstate transportation is not an element of a violation of 18 U.S.C. 1201); *United States* v. *Hobson*, 519 F.2d 765, 769-770 (9th Cir.), cert. denied, 423 U.S. 931 (1975) (knowledge by an accessory after the fact that a federal offense has been committed is not required under 18 U.S.C. 3); *United States* v. *Howey*, 427 F.2d 1017, 1018 (9th Cir. 1970) (knowledge that property taken belongs to the United States is not an element of the offense under 18 U.S.C. 641).

[14] The legislative history cited by the court of appeals (App. A, *infra*, 8a-12a) consists primarily of scattered comments by legislators about versions of the 1934 amendment to Section 1001 that never became law and that were considerably more restrictive than the amendment that eventually was enacted. Moreover, the fact that the legislators referred primarily to types of false statements that normally would be made with knowledge of federal involvement does not suggest that Congress intended to confine the reach of Section 1001 to those particular categories of false statements. The court of appeals itself characterized the legislative history as "not entirely conclusive" (*id.* at 7a). In view of Congress's broad purposes in enacting the 1934 amendments, the court's restrictive reading of the legislative history appears to be clearly incorrect.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-1192
DC No. CR 81-43-R
Filed April 19, 1983

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

ESMAIL YERMIAN, DEFENDANT-APPELLANT.

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted May 3, 1982

Before: FLETCHER, PREGERSON and REINHARDT, Circuit Judges.

OPINION

FLETCHER, Circuit Judge:

Appellant Yermian was charged with violating 18 U.S.C. § 1001 (1976).[1] At trial, Yermian's defense was simply that he did not know at the time he signed a personnel security form that it would be sent to the

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[1] 18 U.S.C. § 1001 (1976) states:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fradulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

government. He appeals his conviction. Our jurisdiction rests on 28 U.S.C. § 1291. We reverse the judgment and remand for a new trial because the trial court construed the scienter requirement of section 1001 too narrowly and gave the jury an inadequate instruction on that issue.

I. FACTS.

Shortly after appellant Yermian was hired as an engineer by Galton Industries, Inc. (Galton) of Hawthorne, California, Galton asked Yermian to fill out a personnel security form. In filling out the form, Yermian provided the company with false information as to his job history and criminal record. At a later date, Galton presented Yermian with a typed version of the form, which Yermian signed, allegedly without carefully re-reading it. A notice at the bottom of the typed form warned that a false representation would be a violation of 18 U.S.C. § 1001 and elaborated on the possible penalty for such a violation.

Galton subsequently sent the form to the Department of Defense, pursuant to a routine FBI security check necessitated by the nature of Galton's work. The FBI discovered that some of Yermian's statements were false and denied Yermian a security clearance. Confronted with the reasons for the denial of his security clearance, Yermian immediately conceded that he had lied.

II. SCIENTER REQUIREMENT OF 18 U.S.C. § 1001.

18 U.S.C. § 1001 provides in part that "[w]hoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully ... makes any false ... statements" shall be fined or imprisoned. 18 U.S.C. § 1001 (1976).[2]

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[2] In *United States* v. *Rose*, 570 F.2d 1358, 1363 (9th Cir. 1978), this court enumerated the elements necessary for a conviction under 18 U.S.C. § 1001; (1) a statement; (2) falsity; (3)

The courts have long recognized that a conviction under section 1001 requires that defendant know at the time he makes the statement that the statement is false, *United States* v. *Lange*, 528 F.2d 1280, 1288-89 (5th Cir. 1976), and that the statement is made in a matter within the jurisdiction of a federal agency, *United States* v. *Kraude*, 467 F.2d 37, 38 (9th Cir.), *cert. denied*, 409 U.S. 1076 (1972); *Lowe* v. *United States*, 141 F.2d 1005, 1006 (5th Cir. 1944).

Yermian concedes that he knew at the time he made the statement that it was false. He also concedes that since the process of checking the security status of the employees of a defense contractor is a matter within the jurisdiction of the Department of Defense and since his false statement regarding his prior employment history and criminal record was connected to that security-checking process, the statement was made in a matter within the jurisdiction of a federal agency. He asserts, however, that at the time he made the admittedly false statement he had no idea that the statement was part of a federal security-checking process and hence had no knowledge that the statement was made in a matter within the jurisdiction of a federal agency. He contends that he had no knowledge that Galton was required to submit information regarding the security status of its employees to the federal government and that Galton's submission to the FBI of the information Yermian had provided was entirely unexpected by him.

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specific intent; (4) materiality; and (5) agency jurisdiction. As the *Rose* court noted, in *United States* v. *Bedore*, 455 F.2d 1009, 1111 (9th Cir. 1972), we had further limited the scope of § 1001 to only those statements that either are related to a claim of the maker "to a privilege from the United States or to a claim against the United States" or "might pervert or corrupt the authorized functions of those agencies to whom the statements were made."

Hence, we must decide whether the element of specific intent embodied in the words "knowingly and willfully" of section § 1001 includes not only the defendant's knowledge of the statement's falsity, but also the defendant's knowledge that the statement, at the time it was made, was made in a matter within the jurisdiction of a federal agency.

No decision in this circuit has addressed the precise question raised here.[3] In *United States* v. *Cella*, 568 F.2d 1266, 1288 (9th Cir. 1978), the defendant contended the evidence was insufficient to show that he knew that his false statement was made in a matter within the jurisdiction of a federal agency. We sustained the conviction, on the basis that it was beyond credulity that the defendant, who was the administra-

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[3] For example, in *United States* v. *Kraude*, 467 F.2d 37, 38 (9th Cir.), *cert. denied*, 415 U.S. 977 (1974), where we held that the submission of false Medicare claims to a contractual agent of HEW was sufficient to support a conviction under § 1001, we did not discuss the issue of defendant's knowledge of federal involvement, presumably because the defendant there must have known that Medicare is a federal program and hence that his false Medicare claims were made in a matter within the jurisdiction of a federal agency. Similarly, in *Gilbert* v. *United States*, 359 F.2d 285, 287 (9th Cir.), *cert. denied*, 385 U.S. 882 (1966), the issue of jurisdictional knowledge did not arise, since the defendant "certainly was aware that the endorsement of the [U.S.] checks was the first crucial step in their journey to the Treasury Department where they would be ultimately presented for payment." In *Ogden* v. *United States*, 303 F.2d 724, 728-32 (9th Cir. 1962), a defense contractor employee raised, and the court addressed only a defense based on impropriety of the security clearance procedures and not one grounded on a lack of jurisdictional knowledge. *See also Neely* v. *United States*, 300 F.2d 67 (9th Cir.) (issue of jurisdictional knowledge not raised), *cert. denied*, 369 U.S. 864 (1962); *Brandow* v. *United States*, 268 F.2d 559 (9th Cir. 1959) (same); *Pitts* v. *United States*, 263 F.2d 252 (9th Cir.) (same), *cert. denied*, 360 U.S. 935 (1959); *Cohen* v. *United States*, 201 F.2d 386 (9th Cir.) (same), *cert. denied*, 345 U.S. 951 (1953).

tor of Mercy Hospital, could be "ignorant" of the fact that his false entries on hospital records "would eventually be used to prepare income tax returns . . . and Medicare reimbursement reports." There was also direct evidence of the defendant's knowledge. In *Cella* we assumed, without holding, that an element of the offense was knowledge of federal involvement.

In sustaining convictions under section 1001, the Second and Eighth circuits have apparently made the same assumption, stressing in their opinions the fact that the defendant had actual knowledge that his false statement was made in a matter within the jurisdiction of a federal agency. *E.g.*, *United States* v. *Candella*, 487 F.2d 1223, 1226-27 (2d Cir. 1973) (defendant "was aware" that his false statements submitted to New York City would form basis for federal reimbursement), *cert. denied*, 415 U.S. 977 (1974); *Ebeling* v. *United States*, 248 F.2d 429, 434-35 (8th Cir.) (defendant employee personally knew and intended that false invoices would become part of a cost statement submitted to federal government by employer for reimbursement), *cert. denied*, 355 U.S. 907 (1957).

By contrast, courts in the Fifth, Sixth, and Seventh circuits have stated that the defendant's knowledge that a false statement is made in a matter within the jurisdiction of a federal agency is not a necessary element of section 1001. *United States* v. *Baker*, 626 F.2d 512, 516 (5th Cir. 1980);[4] *United States* v. *Stanford*, 589 F.2d 285, 297 (7th Cir. 1978), *cert. denied*, 440 U.S. 983

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[4] Although only four years before *Baker* the Fifth Circuit had stressed the existence of defendants knowledge of the "federal government's connection with ... [the false] affidavit" in sustaining a § 1001 conviction, *United States* v. *Lange*, 528 F.2d 1280, 1287 n.11 (5th Cir. 1976), in its 1980 decision, the Fifth Circuit did not mention, let alone distinguish, *Lange*'s emphasis on the existence of the defendant's knowledge of federal involvement.

(1979); *United States* v. *Lewis*, 587 F.2d 854, 857 (6th Cir. 1978) (per curiam). Each of those cases, however, involved a direct attempt by a defendant to obtain funds from a federal source by fraudulent means.

We are now confronted directly with the question whether the government must prove as an essential element of a section 1001 violation that at the time the defendant made the false statement he knew that the statement was made in a matter within the jurisdiction of a federal agency. In light of the paucity of analysis in the cases and the lack of direct authority in our circuit, we must look closely at the language of section 1001 and the policy and purposes underlying it to determine whether jurisdictional knowledge is an essential element of a section 1001 offense.

We find the language of the statute ambiguous, as did the court in *Baker*, 626 F.2d at 515. While the phrase "knowingly and willfully" clearly provides that specific intent is a crucial element of the offense, neither the grammatical construction nor the punctuation of the statute indicates whether the "knowingly and willfully" phrase modifies only the phrase "makes any false, fictitious or fraudulent statements" *or* the broader phrase "in any matter within the jurisdiction of any department or agency of the United States ... makes any false, fictitious or fraudulent statements."

The placement of the "knowingly and willfully" phrase after, rather than before, the "jurisdiction phrase" is not indicative of whether jurisdictional knowledge is an element of the section 1001 offense. In the immediate statutory predecessor to section 1001, the words "knowingly and willfully" did precede not only the phrase "make ... any false or fraudulent statements" but also the phrase "in any matter within the jurisdiction of any department or agency of the United States." Act of Apr. 4, 1938, ch. 69, 52 Stat. 197 (the

"1938 Act").[5] The recodification of the 1938 Act in 1948, that resulted in the present language of section 1001, was intended to be not a "substantive change," *see United States* v. *Bramblett*, 348 U.S. 503, 508 (1954) (describing 1948 revision of the 1938 Act), but merely one of several "minor changes of phraseology." H.R. Rep. No. 304, 80th Cong., 1st Sess. A80-A81 (1947) *reprinted in* 1948 U.S. Code Cong. Serv., Spec. Pamphlet for Title Eighteen 2434, 2535. Consequently, the fact that the "jurisdiction" phrase now precedes the "knowingly and willfully" phrase is not determinative of whether or not the latter phrase was meant to be read to modify the "jurisdiction" phrase.[6]

Although perhaps not entirely conclusive, the legislative history of section 1001 and its predecessors supports the view that Congress intended jurisdictional knowledge to be an element of the crime.[7]

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[5] The 1938 Act stated in pertinent part:

> [W]hoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder . . . shall be fined.

Act of Apr. 4, 1938, ch. 69, 52 Stat. 197.

[6] The inclusion of the word "knowing" in the third clause of § 1001, which emphasizes that the defendant must know that a document he makes or uses contains a falsehood, sheds no light on whether jurisdictional knowledge is required, since the phrase "knowingly and willfully," appearing before all three clauses, remains to provide the basis for a requirement of knowledge of federal involvement pertaining to all three clauses.

[7] While discussing the purported policy and purposes behind § 1001 in general terms, neither the *Baker* nor the *Stanford*

The earliest predecessor of the present section 1001 that made the making of a false statement in a matter within the jurisdiction of any federal agency[8] a crime, the Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015 (the "1918 Act"),[9] specifically included an element of specific intent to defraud the United States. No one could be convicted under the 1918 Act for making a false statement unless he had done so either "for the *purpose* of obtaining ... the payment" of a "claim upon or against the Government of the United States" or "for the *purpose* and with the *intent* of cheating and swindling or defrauding the Government of the United States." 40

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court examined the legislative history of § 1001 or its predecessor statutes. *Baker*, 626 F.2d at 515-16; *Stanford*, 589 F.2d at 297-98. The *Lewis* court, in its analysis of the legislative history of § 1001, did little more than paraphrase a tangentially related Supreme Court case. 587 F.2d at 856-57.

[8] Previous to the 1918 Act, the making of a false statement was itself punishable as a federal crime only if the statement was made for the purpose of obtaining payment or approval of a federal claim *and* the federal claim was made or presented for payment to or approval by military personnel. *See* Act of March 4, 1909, ch. 321, 35 Stat. 1088, 1095-96 (1909).

[9] The 1918 Act stated in pertinent part:

> [W]hoever, for the *purpose* of obtaining or aiding to obtain the payment of [a "claim upon or against the Government of the United States or any department or officer therefor, or any corporation in which the United States of America is a stockholder"], or for the *purpose and* with *the intent of* cheating and swindling or defrauding the Government of the United States or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsity [sic] or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statements or entry .... shall be fined.

Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015 (emphasis added).

Stat. at 1015 (emphasis added). This requirement of specific intent to defraud the United States carried with it an implicit, if not explicit, requirement that the maker of the false statement know that the statement is made in a matter within the jurisdiction of a United States agency.

After the Supreme Court had narrowly construed the phrase "defrauding the Government of the United States" contained in the 1918 Act to mean solely "fraudulent[ly] causing ... [a] pecuniary or property loss" to the federal government, *United States* v. *Cohn*, 270 U.S. 339, 346-47 (1925), Congress sought to extend the reach of the statute to protect more broadly "the authorized functions of governmental departments and agencies from the perversion which might result from ... deceptive practices." *United States* v. *Gilliland*, 312 U.S. 86, 93 (1940) (describing enactment of the Act of June 18, 1934, ch. 587, 48 Stat. 996 (the "1934 Act")).[10] To effect the change, Congress deleted the references to a "purpose" of obtaining payment of a claim upon or against the United States and to a "purpose" and "intent" of cheating or defrauding the United States. *Id.* However, to be sure that a conviction under the new law still required the making of a false statement in a matter within the jurisdiction of the federal

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[10] The 1934 Act stated in pertinent part:

> [W]hoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder ... shall be fined.

Act of June 18, 1934, ch. 587, 48 Stat. 996.

government, Congress inserted a new reference to federal jurisdiction at the end of the description of the prohibited conduct.[11] *United States* v. *Bramblett*, 348 U.S. at 507-08 (describing 1948 revision of the 1938 Act) ("jurisdiction" phrase inserted "simply to compensate for the deleted language as to purpose—to indicate that not all falsifications but only those made to government organs were reached").

The committee reports and the Congressional debates on the various bills[12] which culminated in the

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[11] *Id.*

[12] The convoluted legislative history of the 1934 Act began with the submission of proposed legislation by the Secretary of the Interior on February 7, 1934, to the House and Senate judiciary committees, which legislation was designed to penalize the "presentation of a false written instrument" in any matter within the jurisdiction of the Secretary. S. Rep. No. 288, 73d Cong., 2d Sess. 1 (1934); H.R. Rep. 829, 73d Cong., 2d Sess. 2 (1934). Drawing on the Secretary's proposal, each committee then reported similar bills to the floor, 78 Cong. Rec. 2387 (1934) (reporting S.R. 2686); *id.* at 3112 (reporting H.R. 8046), although the House committee had amended the language of the Secretary's proposal to include an element of intent to defraud the United States. *Compare id.* at 3724 (H.R. 8046) *with id.* at 2152, 2858-59 (S.R. 2686). After debate on and passage of each bill in its house of origin, *id.* at 2858-59 (S.R. 2686); *id.* at 3724-25 (H.R. 8046), the Senate requested the return of its bill from the House and adopted the earlier enacted House version, *id.* at 5746. President Roosevelt then vetoed H.R. 8046 solely on the gound that the bill would punish with lesser penalties certain conduct that was already punishable under the 1918 Act. *Id.* at 6778-79.

Within two months of the presidential veto, the Senate committee on the judiciary, abandoning H.R. 8046, reported amendments to another then unenacted bill, H.R. 8912, 73d Cong., 2d Sess. (1934), which had been designed to extend the 1918 Act to cover injury to U.S. property. The Senate amendments of H.R. 8912 further broadened the scope of the 1918 Act to punish also the presentation of false papers to a federal agency—even where no pecuniary loss to the government resulted—without

1934 Act contain references to the act's broadening the offense to include the presentation of false papers "*before* any department or agency of the Government," H.R. Rep. 829, 73d Cong., 2d Sess. 2 (1934) (emphasis added) (report on H.R. 8046); to the protection of "[t]he rights of the accused" by a requirement that the "act [of presentation of a false written instrument relating to any matter within federal jurisdiction] must be committed willfully and knowingly," *id.*; to the extension of the law so that it "would close around and prosecute those who . . . make false affidavits or submit fictitious bids, and so forth," 78 Cong. Rec. 2859 (1934) (statement of Sen. Ashurst on S.R. [sic] 2686); to the "purpose" of the bill being to protect "the revenues of the people from persons who knowingly make false certificates and supply fictitious bids" and to stop 'these

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lessening the penalties provided under the 1918 Act. 78 Cong. Rec. 9790 (1934) (submitting S. Rep. 1202, 73d Cong., 2d Sess. 1 (1934)). The bill as amended was passed by the Senate, *id.* at 11,270-71, and concurred in by the House, *id.* at 11,513. After examination and signing, *id.* at 11,559, 11,602, the bill was presented to, *id.* at 12,259, and signed by the President, *id.* at 12,452.

H.R. 8912, as amended, being a modification of the previous 1918 Act rather than a newly drafted statute like H.R. 8046 or S.R. 2686, contains phrasing different from H.R. 8046 or S.R. 2686, upon which the 1934 House and Senate debates and committee consideration centered. Nonetheless, neither the Senate report that set forth the amendments to H.R. 8912 nor the brief Congressional proceedings accompanying the swift passage of H.R. 8912 as amended contain any indication whatsoever that the Congress, by substituting H.R. 8912 (the 1934 Act) for the previously passed but vetoed H.R. 8046, intended to alter any substantive aspect of the old bill—including the requisite elements of the offense—other than its lesser penalties and its provision for a specific intent to defraud the United States. Hence, the Congressional debates and committee reports pertaining to H.R. 8046 and S.R. 2686, while technically perhaps not part of the legislative history of the 1934 Act, nonetheless are directly indicative of the Congressional intent underlying the 1934 Act.

grafters, place hunters, and obscene buzzards who are trying to extract money illegally out of the Treasury," *id.* at 2858; and to the printing of a warning about the law on "every proposal," *id.* at 3724 (statement of Rep. McKeown on H.R. 8046). These references indicate that the legislators contemplated application of the 1934 Act in situations where the maker of the statement knows that the statement is made in a matter within the jurisdiction of a federal agency. The fact that the amendment was directly designed to remedy two sorts of conduct in which the makers of false statements clearly know of Federal involvement—the presentation of "false papers" regarding hot oil before the Department of Interior and the use of false certificates of wages paid by contractors in order to obtain reimbursement from the Public Works Administration, S. Rep. No. 1202, 73d Cong., 2d Sess. 1 (1934) (report on H.R. 8912 amendments)—also supports the conclusion that Congress, in deleting from the statute the requirement of fraudulent intent to cause pecuniary loss, did not at the same time intend to eliminate the previous requirement that the maker know that the statement was made in a matter within the jurisdiction of a federal agency.

We conclude that Congress intended that knowledge of federal involvement be an element of the crime. We agree with the *Baker* court that "18 U.S.C. § 1001 is designed to protect federal funds and functions from fraudulent interference." 626 F.2d at 516; *see also United States* v. *Gilliland*, 312 U.S. 86, 93 (1940). This is entirely consistent with the language of the statute and its history. But we do not subscribe to the view that "[i]n furthering these purposes, it is *irrelevant* whether defendant knew that his intentionally false statements might *eventually* influence a federal agency." *Baker*, 626 F.2d at 516 (emphasis added). To the contrary, the defendant's knowledge of federal involvement is entirely relevant to the proper effectuation of

the Congressional goals, and a requirement of section 1001 that such knowledge exist is entirely consistent with the Congressional view of the scope of the statute as revealed by the statutory language and legislative history.

Accordingly, we hold that as an essential element of a section 1001 violation, the government must prove beyond a reasonable doubt[13] that the defendant knew at the time he made the false statement that it was made in a matter within the jurisdiction of a federal agency.[14]

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[13] The existence on the form Yermian signed of a warning that a false statement violates § 1001 is, of course probative of Yermian's knowledge that he was making a statement in a matter within the jurisdiction of a federal agency, but is not, in, and of itself, conclusive on the issue of specific intent. *Contra Terry* v. *United States*, 131 F.2d 40, 43 (8th Cir. 1942) (defendant "by legal implication ... bound to know" from references on form to Federal Housing Administration that false statement was made in a matter within jurisdiction of federal agency).

[14] Because of the similarity of § 1001 to the perjury statute, 18 U.S.C. § 1621 (1976), we find that the cases construing § 1621 bolster our conclusions here. To convict under the perjury statute, the government must prove (1) that the defendant actually knew that his statement at the time he made it was false, *United States* v. *Sweig*, 441 F.2d 114, 117 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971), and (2) that the defendant made the statement under oath, *United States* v. *Arias*, 575 F.2d 253, 254 (9th Cir.), *cert. denied*, 439 U.S. 868 (1978). In the context of the perjury offense, the defendant's taking of an oath ensures that he knows that his false statement, unlike most other false statements he may have made, could possibly subject him to criminal prosecution.

The same principle applies with equal force in the context of § 1001. To ensure that a person knows that the making of a false statement could subject him to criminal liability, the defendant must know at the time he makes the statement that the statement is made in a matter within the jurisdiction of the government. The making of a false statement to a private entity, without knowledge that the statement is made in a matter within the jurisdiction of a federal agency, does not fall within the

III. ADEQUACY OF JURY INSTRUCTIONS.

The government contends that even if knowledge of governmental involvement is an essential element of 18 U.S.C. § 1001, the instruction given to the jury met that requirement. The jury was instructed that it could convict upon a finding "that the defendant knew or *should have known* that the information was to be submitted to the government" (emphasis added). The government argues that the instruction reflects a "reasonably foreseeable" standard and that this "objective" standard[15] is proper if knowledge that the statement is destined for the government is an element of the crime.

The standard proposed by the government, however, does not comport with the "subjective" standard of criminal knowledge required by this circuit. *United States* v. *Jewell*, 532 F.2d 697 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976). In *Jewell*, we held "(1) that the required knowledge is established if the ac-

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strictures of § 1001, even if the statement is in fact forwarded to the government.

For similar reasons, we are not convinced by the reliance of the *Stanford* and *Lewis* courts on *United States* v. *Feola*, 420 U.S. 671 (1975). *See Stanford*, 589 F.2d at 297-98; *Lewis*, 587 F.2d at 857. In *Feola*, the Supreme Court held that 18 U.S.C. § 111 (1976), which makes assault upon a federal officer a federal offense, does not include as an element of the offense the defendant's knowledge that the assaulted person is a federal officer. 420 U.S. at 684. However, unlike making a false statement, committing an assault is a crime—even apart from the federal statute—in every state of the Union. Hence, as the Supreme Court pointed out, § 111 is "no snare for the unsuspecting," since one committing an assault "knows from the very onset that his planned course of conduct is wrongful" and because § 111 does not create a "situation ... where legitimate conduct becomes unlawful solely because of the [federal] identity of the individual or agency affected." *Id.* at 685.

[15] By contrast, a "subjective" knowledge standard requires proof that the defendant actually knew the pertinent fact.

cused is aware of a high probability of the existence of the fact in question, (2) unless he actually believes it does not exist." *Id.* at 704 n.21; *see also United States* v. *Esquer-Gamez*, 550 F.2d 1231, 1235-36 (9th Cir. 1977).

In this case, the court's instruction allowed the jury to find knowledge merely on the basis that the defendant should have known that his statements were going to the government and hence were made in a matter within federal agency jurisdiction. It allowed the jury to convict Yermian even if it did not find that he was aware of a high probability that the statement was made in a matter within the jurisdiction of the government, or, indeed, even if it believed that he, in fact, did not know that his statement would be sent to the government.

The district court's judgment is, therefore, REVERSED and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-1192
DC No. CR 81-43-R
Filed July 5, 1983

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

ESMAIL YERMIAN, DEFENDANT-APPELLANT.

Before: FLETCHER, PREGERSON and REINHARDT, Circuit Judges

ORDER

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.